In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 833

HOUSTON CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., AND CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–8a) is reported at 349 F. 2d 449. The Board's Decision and Order (R. 82–93) [1] are reported at 143 NLRB 409.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1965, a timely petition for rehearing was denied on September 14, 1965, and a decree enforcing the Board's order was entered on September

[1] "R." refers to the printed Volume I, Transcript of Record in the court below. "J.A." refers to the printed Joint Appendix in the court below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

799-478—66

22, 1965 (Pet. 9a–11a). The petition for writ of certiorari was filed on December 17, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the petition at pp. 13a–16a.

QUESTIONS PRESENTED

1. Whether the Union's proposal that applicants for employment be hired exclusively through a union hiring hall operated on a nondiscriminatory basis was a proposal relating to "wages, hours, and other terms and conditions of employment," and thus a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act.

2. Whether Section 14(b) of the Act permits a State to prohibit an agreement embodying such a proposal.

STATEMENT

Petitioner Associations are bargaining agents for a group of building and construction contractors doing business in Texas. They have bargained, in a multi-employer unit, with the Union,[1] which has been recognized as the representative of the hod carriers and laborers employed by petitioners' members (R. 49–52, 82–83; 23–25, 29, 42). At the outset of negotiations

[1] Construction and General Laborers Union, Local No. 18, International Hod Carriers, Building and Common Laborers Union, AFL–CIO.

over a contract to succeed the agreement due to expire October 31, 1961, the Union proposed a provision to establish a union hiring hall as the sole source of employees for petitioners' members (R. 83; 29–30, J.A. 11, 35, 73, 76). Under the proposed provision, the Union would select and refer applicants to the employers on the basis of factors such as seniority of employment within the unit, length of residence in the area, and general work experience in the trade, "without discrimination * * * by reason of membership or non-membership in the Union" (R. 83; J.A. 35–37, 76). Employers were to have the right to reject or request individual applicants for employment, and grievances arising from the operation of the hiring hall were to be subject to final determination by an "Appellate Tribunal" composed of an equal number of employer and union representatives (R. 83; J.A. 41, 76–81, 82–84). Petitioners rejected and refused to discuss the terms of the Union's proposal on the ground that it was illegal under the Texas "right-to-work" law[3] (R. 53, 83; J.A. 16–20, 31, 37–51, 59, 60, 63, 67–69).

After the expiration of the existing contract, the Union struck in support of its demands. Petitioners thereupon obtained from the District Court of Harris County, Texas, a temporary injunction restraining the strike or any picketing incident thereto, so long as it "has as an object the obtaining of an agreement * * * which provides that the * * * Union

[3] The provisions of the Texas statute are set forth at p. 17a of the petition.

shall be the sole or exclusive source of referrals of applicants for employment in violation of * * * the [Texas] Revised Civil Statutes" (R. 83, 92; J.A. 97–103, 105–110, 112–116). The Union thereafter withdrew its demand for the hiring hall, resumed negotiations with petitioners, and entered into a contract with them (R. 54, 83, 84; 48–49, 51, 69–70, 118, 131–133).

The Union then filed a charge with the Board alleging that petitioners had violated Section 8(a)(5) and (1) of the Act by refusing to bargain regarding the hiring hall proposal. The Board (with two members dissenting) found that the Union's proposal came within the area of mandatory bargaining over "wages, hours, and other terms and conditions of employment" specified in Section 8(d) of the Act, and that petitioners had therefore violated the Act by refusing to bargain about that proposal (R. 84–89).[4] The Board rejected petitioners' contention that the proposed hiring hall clause would constitute an agreement "requiring membership in a labor organization as a condition of employment" within the meaning of Section 14(b) of the Act, which withdraws federal authorization from such agreements where "prohibited by State or Territorial law" (R. 89–91). The Board ordered petitioners, *inter alia,* to cease and desist from their unlawful refusal to bargain, and to bargain, upon request, with the Union about an "ex-

[4] The Board's findings that petitioners had refused to bargain about the proposal (R. 83) and that the issues were not mooted by the execution of a collective bargaining agreement (R. 91-92) are not challenged here.

clusive, nondiscriminatory referral system" of hiring (R. 69–71, 93).

The court of appeals sustained the Board's findings and enforced the Board's order in its entirety (Pet. 1a–8a).

ARGUMENT

1. The court of appeals correctly held that the Union's proposal for an exclusive hiring hall was a matter respecting "wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d) of the Act. In an area of transient employment, such as the building and construction industry with which this case deals, an exclusive hiring hall system plainly affects "conditions of employment," for it affords employee security by guaranteeing that seniority and experience will count on future jobs. See *Local 357, Teamsters* v. *National Labor Relations Board,* 365 U.S. 667, 672–673. The same conclusion was reached in the only other court of appeals decision on the question. *National Labor Relations Board* v. *Tom Joyce Floors, Inc.* (C.A. 9), November 4, 1965, 60 LRRM 2434.[5]

[5] There is no occasion in this case to reach the broad question, sought to be raised by the petition, whether all "matters preceding" the establishment of an employment relationship are "conditions of employment" and thus mandatory bargaining subjects (Pet. 8–9); hiring halls in the transient construction industry, as shown in the text, directly affect employee security and are thus within the definition in all events. In the Board's view, however, the term "conditions of employment," as used in Section 8(d), is, in fact, broad enough generally to cover subjects relating to establishing and terminating the employment relationship, as well as those relating solely to the continuation of that relationship. Cf. *Fibreboard Corp.* v. *National Labor Relations*

There is no merit to petitioners' contention that Section 8(f) of the Act requires a contrary conclusion (Pet. 12–15; Section 8(f) is set forth at Pet. 16a). As the court of appeals properly noted (Pet. 5a–6a), the legislative history of Section 8(f) shows that its purpose was to permit certain agreements in the building construction industry which would otherwise have been unlawful.[6] Section 8(f) does not, however, limit the rights conferred upon a union by other provisions of the Act. Since the Union here had the status of statutory bargaining representative, it had the right to compel bargaining over conditions of employment without reference to the provisions of Section 8(f).

2. The court of appeals properly rejected petitioners' alternative contention (Pet. 16–20) that, by virtue of Section 14(b) of the Act, the Union's hiring hall proposal was illegal under the Texas "right-to-work" statute. Section 14(b) empowers a State to regulate "agreements requiring membership in a labor organi-

---

Board, 379 U.S. 203. The Board does not believe that this conclusion is precluded by the fact that Section 8(a)(3), which bars discrimination in employment, contains the word "hire" in addition to the phrase "condition of employment," whereas Section 8(d) does not contain the word "hire" (see Pet. 9–10). As the court below observed (Pet. 5a), Section 8(d) "also fails to mention 'tenure of employment' while this clause is present in § 8(a)(3), and it has been held [citing *Fibreboard*, *supra*], that 'tenure of employment' is a condition of employment and subject to mandatory bargaining."

[6] See S. Rept. No. 187 on S. 1555, 86th Cong., 1st Sess., pp. 28–29, 56, I Leg. Hist. of LMRDA (G.P.O., 1959), pp. 424–425, 452; H. Rep. No. 741 on H.R. 8342, 86th Cong., 1st Sess., p. 50, I Leg. Hist. 808; 105 Cong. Rec. A8274, September 18, 1959, II Leg. Hist. 1823.

zation as a condition of employment''—or their equivalent. See *Retail Clerks Ass'n* v. *Schermerhorn,* 373 U.S. 746, 750–751. The referral arrangement proposed by the Union here, however, explicitly provided that applicants for employment should be selected and referred "without discrimination by reason of membership or non-membership in the Union" (J.A. 76, par. 3). Union membership was therefore not a condition of employment under the hiring hall proposal in this case.[7] See *Local 357, Teamsters* v. *National Labor Relations Board,* 365 U.S. 667, 675.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MALCOLM SCHULTZ,
Attorney,
National Labor Relations Board.
JANUARY 1966.

[7] The cases relied upon by petitioners (Pet. 18) do not support their contention that the Union's proposal was the equivalent of requiring union membership as a condition of employment. Those cases involved either "agency shop" provisions, requiring nonunion employees to pay dues or the equivalent thereof to the union, or provisions for preferential hiring of union members.

U.S. GOVERNMENT PRINTING OFFICE: 1966